APPENDIX A

504 F.3d 903

United States Court of Appeals, Ninth Circuit.

Steve SANDERS, Individually and as Class Representative, Plaintiff-Appellant,

v.

Edmund G. BROWN Jr.,* in his official capacity as Attorney General of the State of California; Philip Morris USA, Inc.; R.J. Reynolds Tobacco Company; Brown & Williamson Tobacco Corp.; Lorillard Tobacco Company, Defendants-Appellees.

No. 05-15676.

Argued and Submitted Feb. 15, 2007.
Filed Sept. 26, 2007.

***906** Appeal from the United States District Court for the Northern District of California; Susan Yvonne Illston, District Judge, Presiding. D.C. No. CV-04-02281-SI.

Before: B. FLETCHER, RICHARD R. CLIFTON, and SANDRA S. IKUTA, Circuit Judges.

CLIFTON, Circuit Judge:

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* Edmund G. Brown Jr. is substituted for his predecessor, Bill Lockyer, as Attorney General of the State of California, pursuant to Fed. R.App. P. 43(c)(2).

This case involves an indirect legal challenge to the massive settlement agreement between the nation's largest tobacco companies and the attorneys general of 46 states and several territories. The 1998 settlement known as the Master Settlement Agreement, or "MSA," resolved all of these states' and territories' claims against those tobacco companies, which the states had sued for billions of dollars in damages related to the harmful effects of smoking.

Plaintiff Steve Sanders, a smoker, alleges that cigarette prices have skyrocketed in the nine years since the MSA, and that the price increases are the result of an illegal price-fixing scheme that the MSA enabled. On behalf of a putative class of cigarette smokers, Sanders sued the Attorney General of the State of California and the four largest tobacco companies: Philip Morris USA Inc., R.J. Reynolds Tobacco Co., Brown & Williamson Tobacco Corp., and Lorillard Tobacco Co.[1] Sanders does not allege that the MSA itself is illegal, but rather alleges that the MSA, the post-MSA price increases, and the state statutes implementing the MSA's terms (the "implementing statutes") are evidence of a cigarette price-fixing cartel that violates the Sherman Act, 15 U.S.C. § 1 *et seq.*; the Cartwright Act, Cal. Bus. & Prof.Code §§ 16720 *et seq.*; other California unfair competition statutes, Cal. Bus. & Prof.Code §§ 17200 *et seq.*; and California's common law of unfair competition. Sand-

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[1] Unless otherwise noted, this opinion will refer to the tobacco companies as "tobacco defendants" and the attorney general as "the State of California." It will use the term "defendants" when referring to both groups collectively.

ers also alleges that the Sherman Act preempts the implementing statutes.

The defendants moved to dismiss under Fed. R.Civ. P. 12(b)(6). The district court granted the motions and dismissed the claims with prejudice. *See Sanders v. Lockyer,* 365 F. Supp.2d 1093 (N.D. Cal. 2005). The district court held that the Sherman Act does not preempt the implementing statutes; that Sanders failed to adequately plead an antitrust violation; and that even if Sanders had done so, the defendants were immune from liability. We affirm.

I. Background

The following facts are undisputed for the purpose of the motion to dismiss, unless otherwise noted. The United States cigarette market is dominated by four companies: Philip Morris USA Inc., R.J. Reynolds Tobacco Co., Brown & Williamson Tobacco Corp., and Lorillard Tobacco Co. Their combined sales have accounted for more than 90 percent of cigarette sales for at least the last decade.

These four companies in the 1990s faced coordinated lawsuits by the attorneys general of most states and U.S. territories, who sought money and other relief to help their governments cope with the harmful effects of smoking and the costs imposed by those effects. In late 1998, the tobacco companies and the attorneys general signed the MSA.[2] State courts, including the California Superior Court, then ap-

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[2] The MSA in its entirety can be found at www.naag.org/backpages/naag/tobacco/msa/msa.pdf (last visited Aug. 23, 2007).

proved *907 the MSA in consent decrees and dismissed the lawsuits against the tobacco companies.

The MSA requires the four major tobacco companies-who, as the initial signatories of the MSA, are known as the "Original Participating Manufacturers"-to pay the states billions of dollars each year. The total annual payments are based on a formula that considers inflation and the total number of individual cigarettes sold in the fifty United States, the District of Columbia and Puerto Rico. Each Original Participating Manufacturer (or "OPM") must annually contribute a portion of the total payment that is equal to the OPM's share of that year's cigarette sales (the OPM's "market share"). For example, if an OPM's market share is 25 percent, that OPM must contribute 25 percent of that year's settlement payment.

The OPMs expected to raise cigarette prices to help pay for the settlement and feared that smaller manufacturers, which were not part of the negotiations, would seize the chance to compete with cheaper cigarettes, possibly cutting into the OPMs' market share. The settling parties addressed this problem in three ways. First, the MSA offered a carrot to non-OPM tobacco companies to join the settlement agreement. These "Subsequent Participating Manufacturers" ("SPMs") could join the settlement within 90 days of the enactment of the MSA. They would not have to make any part of the payments due to the states so long as their market share remained at or below their 1998 market share (or 125 percent of their 1997 market share, whichever was greater). If an SPM's market share increased, however, the SPM

would have to contribute to the settlement payment, with the contribution based on the sales in excess of the SPM's 1998 sales (or 125 percent of 1997 sales, if applicable). For example, if an SPM sold 250,000 cigarettes in 1998, and then one year later sold a larger share of the market-say, 300,000 cigarettes-the SPM would have to contribute to the settlement payment. If the extra 50,000 cigarettes equaled 1 percent of the market share, the SPM would have to pay 1 percent of the settlement payment. As of August 15, 2007, forty-four smaller tobacco companies are participating in the MSA as SPMs.[3]

Second, the OPMs would pay less money under the MSA if their total sales dropped below a certain amount. If the reason for this drop is competition by tobacco companies that did not participate in the MSA, the settlement payment would be reduced even further.

Third, most states have enacted two sets of statutes that allegedly make it harder for non-signatory tobacco companies (and any future market entrants) to undercut the OPMs' and SPMs' market shares. Sanders alleges that the states were motivated to pass these statutes out of fear that the OPMs' higher prices would cause their market share to fall, thereby reducing the amount of the settlement payments to the states. These "implementing statutes" are known in most states as the "Qualifying Act" and the "Contraband Amendment."

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[3] The list can be found on the website of the National Association of Attorneys General, www. naag. org/ backpages/ naag/ tobacco/ msa/ participating_ manu/ (last visited Aug. 22, 2007).

Under the "Qualifying Act," non-signatory tobacco companies (also known as "Non-Participating Manufacturers," or "NPMs") have to pay a portion of their revenues into an escrow account. The money in the escrow account acts as a liability reserve. If the NPMs are successfully sued for cigarette-related harms, *908 the money in the escrow accounts will pay the damage awards. Each NPM's payment is based on market share, and is roughly the same per-cigarette cost as the amount that OPMs must pay to abide by the MSA. The payments can only be used to pay a judgment or settlement on a claim against the NPM, up to the amount that the NPM would otherwise pay under the MSA. Any remaining funds in the escrow account revert back to the NPM after twenty-five years.

This law allegedly prevents the NPMs from undercutting the prices of OPMs' cigarettes by taking away the extra profitability that an NPM would enjoy. For example, say that OPMs' sales are such that for a given year, they must pay 25 cents per cigarette to the states under the MSA. This would seem to give NPMs a cost advantage of 25 cents per cigarette. But under the Qualifying Act, if an NPM also sold cigarettes that year, the NPM would have to pay roughly 25 cents per cigarette into an escrow account, which the NPM could not touch for 25 years. In other words, the NPM's cost advantage over the OPMs is erased.

The "Contraband Amendment," for its part, penalizes NPMs who refuse to make escrow payments under the Qualifying Act. The Contraband Amendment allows a state to "de-list" NPMs from a list of approved tobacco manufacturers. De-listing effectively

prevents the offending NPM from selling cigarettes in that state.

The California legislature has enacted a Qualifying Act and a Contraband Amendment. Cal. Health & Safety Code §§ 104556, 104557 (Qualifying Act); Cal. Bus. & Prof.Code § 22979(a), (b), and Cal. Rev. & Tax Code § 30165.1(d), (e) (Contraband Amendment).

As expected, the OPMs' cigarette prices rose when the MSA took effect. Sanders alleges, however, that the price increases have far exceeded the tobacco companies' costs of complying with the MSA. The OPMs allegedly raised their prices by $12.20 per carton between late 1998 and early 2002-more than twice the amount necessary to meet the OPMs' obligations under the MSA. Also, the price increases have been "parallel." Whenever one OPM has raised its cigarette prices, the others have generally matched the increase. Despite these increases, the OPMs' cigarette sales still account for more than 90 percent of the market.

The price increases and other factors have prompted several legal challenges against the MSA, most alleging antitrust and constitutional violations. The challenges have been largely unsuccessful. *See, e.g., Tritent Int'l Corp. v. Kentucky,* 467 F.3d 547 (6th Cir. 2006); *Mariana v. Fisher,* 338 F.3d 189 (3d Cir. 2003); *A.D. Bedell Wholesale Co. v. Philip Morris Inc.,* 263 F.3d 239 (3d Cir. 2001); *Xcaliber Int'l Ltd. v. Kline,* No. 05-2261-JWL, 2006 WL 288705 (D. Kan. Feb.7, 2006); *Xcaliber Int'l Ltd. v. Edmondson,* No. 04-CV-0922-CVE-PJC, 2005 WL 3766933 (N.D. Okla. Dec.13, 2005); *S & M Brands, Inc. v. Summers,* 393 F. Supp.2d 604 (M.D. Tenn. 2005); *PTI, Inc. v. Philip*

Morris Inc., 100 F. Supp.2d 1179 (C.D. Cal. 2000); *Forces Action Project LLC v. California*, No. C99-0607 MJJ, 2000 WL 20977 (N.D. Cal. Jan.5, 2000), *aff'd in relevant part*, 16 Fed. Appx. 774 (9th Cir.2001) (unpublished disposition); *Hise v. Philip Morris Inc.*, 46 F.Supp.2d 1201 (N.D. Okla.1999), *aff'd*, 208 F.3d 226 (10th Cir. 2000) (unpublished disposition). *But see Freedom Holdings Inc. v. Spitzer*, 357 F.3d 205 (2d Cir. 2004).

II. The Present Case

Sanders alleges that the MSA has spawned a "cartel" because it lets the participating tobacco companies "raise prices without fear of losing sales or market ***909** share." Sanders does not allege that the tobacco companies have agreed amongst themselves to fix prices. Instead, he alleges that the MSA penalizes tobacco companies for competing on price, because they have to pay more money under the MSA as their market shares increase. As a result, tobacco companies allegedly will be reluctant to increase market share. Thus, when one tobacco company raises its prices, all other tobacco companies allegedly can raise prices in lockstep without fearing that their rivals will try to undercut them. "[I]n effect," the complaint alleges, "the OPMs have agreed to compensate each other [f]or any market share increase ... by imposing a proportionate increase in the settlement payment for such market share gain."[4]

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[4] It is not clear that a proportionate price increase, which would not affect the per-cigarette cost of doing business, would dissuade a tobacco company from attempting to increase its market share. We need not, however, address the merits of this claim, as the following discussion will show.

Sanders also alleges that the MSA encouraged other tobacco companies to join the cartel. Any company that has joined the MSA as an SPM will be reluctant to increase its market share beyond 1998 levels, because by doing so it would be forced to pay some money to the states.[5] As a result, the SPMs followed the OPMs when they increase their prices.

Sanders further alleges that the MSA encouraged the states to pass anti-competitive laws protecting the alleged cartel from price competition. This is because the OPMs' payments to the states drop if their total sales drop below a threshold level, or if non-signatory NPMs take away OPMs' market share. The states, Sanders alleges, therefore passed the Qualifying Acts and Contraband Amendments to keep NPMs from entering the market.

The sum of these parts, Sanders alleges, is an illegal "horizontal output-restriction cartel" in which the OPMs, backed by state authority (or, at least, state acquiescence), have raised cigarette prices to artificially high (or "supracompetitive") levels without fear of price competition. This scheme is preempted by the Sherman Act, Sanders argues, because it so obviously conflicts with federal antitrust law. Furthermore, Sanders argues that even if the scheme consisting of the MSA and its implementing statutes is not facially preempted, the tobacco defendants have still commit-

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[5] It is not clear whether this extra payment would really dissuade the SPM from seeking extra market share. If an SPM would pay to the states less money than it would make by selling extra cigarettes, an SPM still might turn a higher profit by increasing its market share. Again, we need not address the merits of this claim.

ted illegal price-fixing, as evidenced by the parallel price increases. Finally, Sanders argues that the State of California failed to adequately supervise the tobacco companies' pricing actions.[6]

***910** The defendants filed motions to dismiss, arguing, among other things, that they are immune to antitrust liability under either (1) the *Noerr-Pennington* immunity doctrine, described in *E. R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 135-145, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961), and *United Mine Workers of America v. Pennington*, 381 U.S. 657, 669-70, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965); or (2) the "state action" immunity doctrine that originated in *Parker v. Brown*, 317 U.S. 341, 350-52, 63 S.Ct. 307, 87 L.Ed. 315 (1943).

The district court granted the motions to dismiss. *See Sanders*, 365 F.Supp.2d at 1105. The district court held that the Sherman Act did not preempt the

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[6] The relief Sanders seeks includes:

(1) A declaratory judgment that California's Qualifying Act and Contraband Amendment are both "facially void as a *per se* restraint of trade," and therefore preempted by the Sherman Act.

(2) An injunction against the state to keep it from enforcing the MSA and the implementing statutes, and against the tobacco defendants to make them "cease their anticompetitive activity taken in furtherance of the MSA."

(3) Money damages against the tobacco defendants for operating an illegal price-fixing cartel.

Sanders's complaint also seeks to enjoin implementation of the "anticompetitive provisions" of the MSA. His appeal, however, does not address whether the MSA itself is illegal. Sanders instead argues that the MSA is one part of a larger illegal scheme. We therefore need not address whether the MSA itself would be legal in the absence of the alleged larger scheme.

MSA implementing statutes because those statutes do not authorize any *per se* illegal activity. *See id.* at 1101. The district court also held that the state action immunity doctrine protected the defendants from suit because the MSA and its implementing statutes were formed by sovereign state acts that cannot be challenged under federal antitrust law. *See id.* at 1098-1101, 1103-05. The district court further held that the defendants were entitled to *Noerr-Pennington* immunity because their acts of negotiating and entering into the MSA constituted protected speech. *See id.* at 1101-03. Finally, the district court held that Sanders's state law claims failed because the defendants were immune to those claims as well. *See id.* at 1104-05.

III. Analysis

A dismissal under Rule 12(b)(6) is reviewed *de novo. See Knievel v. ESPN,* 393 F.3d 1068, 1072 (9th Cir. 2005). All allegations of fact are taken as true. *See id.* Conclusory allegations and unreasonable inferences, however, are insufficient to defeat a motion to dismiss. *See Cholla Ready Mix, Inc. v. Civish,* 382 F.3d 969, 973 (9th Cir.2004); *Warren v. Fox Family Worldwide, Inc.,* 328 F.3d 1136, 1139 (9th Cir. 2003).

Review is generally limited to the contents of the complaint, but a court can consider a document on which the complaint relies if the document is central to the plaintiff's claim, and no party questions the authenticity of the document. *See Warren,* 328 F.3d at 1141 n. 5. We therefore can analyze the MSA, which is obviously central to the claim, in evaluating the strength of Sanders's allegations.

A. Preemption

Sanders argues that California's Qualifying Act and Contraband Amendment are preempted by Section 1 of the Sherman Act, which states that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce ... is declared to be illegal." 15 U.S.C. § 1. To be preempted by this Act, a state statute must be in "irreconcilable" conflict with the federal antitrust regulatory scheme. *Rice v. Norman Williams Co.*, 458 U.S. 654, 659, 102 S.Ct. 3294, 73 L.Ed.2d 1042 (1982). The only way such a conflict can exist, according to the Supreme Court, is if the state statute "mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or if it places irresistible pressure on a private party" to violate those laws. *Fisher v. City of Berkeley*, 475 U.S. 260, 265, 106 S.Ct. 1045, 89 L.Ed.2d 206 (1986) (quoting *Rice*, 458 U.S. at 661, 102 S.Ct. 3294) (internal quotation marks omitted). A conflict that is "hypothetical or potential" is "insufficient" to warrant preemption. *Rice*, 458 U.S. at 659, 102 S.Ct. 3294. Thus, a state statute is only preempted by the Sherman Act "when the conduct contemplated by the statute is in all cases a ***911** *per se* violation. If the activity addressed by the statute does not fall into that category ... the statute cannot be condemned in the abstract." *Id.* at 661, 102 S.Ct. 3294.

Neither the Qualifying Act nor the Contraband Amendment explicitly allow price fixing, market division, or other *per se* illegal monopolistic behavior. Sanders argues, however, that these statutes create such high barriers to NPMs' market entry and ability

to price-compete that they have "virtually guaranteed collusion and monopoly prices in the cigarette market." (Quoting 1 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law,* ¶ 226(a), at 35 (2006 Supp.)). The statutes therefore place irresistible pressure on all cigarette companies to fix prices, Sanders argues.

The statutes do place some pressure on some new entrant tobacco companies to charge higher prices if they decide to enter the market. The Qualifying Act forces NPMs to place into escrow a per-cigarette payment roughly equal to the per-cigarette payment that participating manufacturers pay under the MSA. The Contraband Amendment prevents NPMs who fail to make the escrow payments from distributing their cigarettes. If NPMs wish to remain profitable, they must factor the escrow payments into the prices they charge per cigarette. The statutes thus may cause higher prices and dissuade some potential market entrants. Nothing, however, forces the NPMs to either peg their prices to those of participating manufacturers, or to refrain altogether from entering the market. If the OPMs really are charging artificially high prices, and thus making artificially high profits, an NPM conceivably could compete on price by charging a "normal" price and still make a "normal" profit, even taking the escrow payment into account.

Sanders therefore has failed to adequately allege that the implementing statutes mandate or authorize conduct that "in all cases" violates federal antitrust law. *See Fisher,* 475 U.S. at 265, 106 S.Ct. 1045 (quoting *Rice,* 458 U.S. at 661, 102 S.Ct. 3294) (inter-

nal quotation marks omitted). The implementing statutes are thus not preempted by the Sherman Act. *See, e.g., Tritent,* 467 F.3d at 557-58 (holding that Kentucky statutes implementing the MSA in that state were not preempted because they did not mandate or authorize illegal activity "in all cases").[7]

B. Immunity

Sanders next argues that even if the Sherman Act does not preempt the implementing statutes, the tobacco companies have nonetheless violated the Act by using the MSA and implementing statutes to create a price-fixing cartel. The state of California, for its part, has allegedly fostered this cartel either by passing the implementing ***912** statutes and thus encouraging price-fixing, or at least by failing to prevent it from happening.

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[7] The Second Circuit has held that the MSA and its companion statutes are preempted by federal law. *See Freedom Holdings,* 357 F.3d at 222-32. The *Freedom Holdings* opinions (both the original and the denial of the petition for rehearing) feature forceful economic arguments on how tobacco companies could potentially use the MSA and its companion statutes to minimize price competition and keep new entrants out. The court concludes that the "alleged arrangement, even without the protection of the Contraband Statutes ... would be a *per se* violation because it is a naked restraint on competition.... With the Contraband Statutes in force, the scheme as alleged threatens to become a permanent, nationwide cartel." 357 F.3d at 226.*Freedom Holdings,* however, ignores the *Rice* requirement that the statute "in all cases" mandate *per se* illegal conduct. The Sixth Circuit in *Tritent* disagreed with *Freedom Holdings* for that very reason. *Tritent,* 467 F.3d at 557-58. We agree with the Sixth Circuit and, likewise, decline to follow the Second Circuit's approach.

The defendants argue that Sanders has failed to allege any conduct that would violate the Sherman Act. The defendants also argue that even if Sanders has adequately pleaded Sherman Act violations, they are nonetheless immune from prosecution under the *Noerr-Pennington* immunity doctrine, the state action doctrine, or both.

1. ***Noerr-Pennington* immunity**

The tobacco defendants argue that their acts of (1) negotiating the MSA, (2) petitioning the California courts for approval of the MSA, and finally (3) acting according to the MSA's terms, are constitutionally protected from antitrust liability under the *Noerr-Pennington* immunity doctrine.

The *Noerr-Pennington* doctrine arises from two Supreme Court cases, *E. R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 135-145, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961), and *United Mine Workers of America v. Pennington*, 381 U.S. 657, 669-70, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965). The Court, citing First Amendment and federalism concerns, held that private actors are immune from antitrust liability for petitioning the government, even when the private actors' motives are anticompetitive. *Noerr-Pennington* immunity protects petitions to all departments of the government. *See Cal. Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972); *Kottle v. Northwest Kidney Ctrs.*, 146 F.3d 1056, 1059 (9th Cir. 1998).

The Supreme Court has interpreted "petitioning" to encompass activities other than legislative lobbying. For example, *Noerr-Pennington* immunity protects private actors when they file court documents

and enter contracts with the government. *See Trucking Unlimited,* 404 U.S. at 510, 92 S.Ct. 609;*see also Greenwood Utilities Comm'n. v. Mississippi Power Co.*(*Greenwood Utilities*), 751 F.2d 1484, 1505 (5th Cir.1985).

Neither the Supreme Court nor the Ninth Circuit have specifically held that a settlement agreement like the MSA qualifies as "petitioning" that may be protected by *Noerr-Pennington* immunity. The Seventh Circuit, however, has explicitly held that *Noerr-Pennington* immunity protects private parties from liability for negotiating and entering into settlements or other agreements with the government. *See Campbell v. City of Chicago,* 823 F.2d 1182, 1186-87 (7th Cir.1987). We now join that circuit in so holding.

In *Noerr,* the Supreme Court reasoned that petitioning of government officials deserved immunity from antitrust liability for two reasons. 365 U.S. at 137-38, 81 S.Ct. 523. First, allowing liability for such petitions would "substantially impair the power of [state] government to take actions through its legislature and executive that operate to restrain trade." *Id.* at 137, 81 S.Ct. 523. Second, "[t]he right of petition is one of the freedoms protected by the Bill of Rights," and nothing in the Sherman Act indicated an intent to "invade" that freedom. *Id.* at 138, 81 S.Ct. 523. Furthermore, the Court concluded that it is inappropriate to base liability on whether a petitioner has an anticompetitive motive, because that would unduly chill speech:

> It is inevitable, whenever an attempt is made to influence legislation by a campaign of publicity, that an incidental effect of that

> campaign may be the infliction of some direct injury upon the interests of the party against whom the campaign is directed. And it *913 seems equally inevitable that those conducting the campaign would be aware of, and possibly even pleased by, the prospect of such injury. To hold that the knowing infliction of such injury renders the campaign itself illegal would thus be tantamount to outlawing all such campaigns.

Id. at 143-44, 81 S.Ct. 523.

The act of negotiating a settlement with a state undoubtedly is a form of speech directed at a government entity. Given the Court's desire to protect free speech from Sherman Act attack, it is clear why *Noerr-Pennington* immunity should protect a private party from liability for such an act. If a person undertaking to negotiate a way out of his legal troubles were to fear that the very act of negotiating would expose him to further liability, he might be afraid to attempt a settlement in the first place. The result would be fewer settlements, even when the parties would otherwise be willing to reach a principled compromise, and more cases dragging on for years to the detriment of all parties, not to mention the court system.

Furthermore, holding that a private party's settlements with the government are exposed to antitrust liability would surely, as the Supreme Court in *Noerr* warned, "substantially impair the power of [state] government to take actions through its legislature and executive that operate to restrain trade." *Id.* at 137, 81 S.Ct. 523. If a state can restrain trade

through its "legislature and executive," that means the attorney general, an executive officer, can negotiate trade restraints in the context of litigation, so long as those restraints are not preempted by the Sherman Act.

We therefore hold that *Noerr-Pennington* immunity protects a private party from liability for the act of negotiating a settlement with a state entity.[8] Immunity thus protects the tobacco defendants from liability for the act of negotiating the MSA with the State of California.

Sanders argues that even if *Noerr-Pennington* immunity protects the defendants from liability for the MSA itself, it does not protect the tobacco defendants from liability for increasing prices after the MSA. Sanders bases his argument on the plurality opinion in *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 96 S.Ct. 3110, 49 L.Ed.2d 1141 (1976). In *Cantor,* a private utility gave free light bulbs to customers, an act that allegedly harmed light bulb retailers. *See id.* at 581-82, 96 S.Ct. 3110. Even though the free-bulb program had technically been "approved" by state regulators-it was included in the utility's proposed rate plan-the plurality declined to extend *Noerr-Pennington* immunity to the program. The plurality said that "nothing in the *Noerr* opinion implies that the mere fact that a state regulatory agency may approve a proposal ... and thereby require that the pro-

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[8] We do not address whether *Noerr-Pennington* immunity may protect an anticompetitive settlement agreement between two *private* entities, who conceivably could claim that the act of petitioning the court to accept their agreement immunizes the agreement itself.

posal be implemented ... is a sufficient reason for conferring antitrust immunity on the proposed conduct." *Id.* at 601-02, 96 S.Ct. 3110. Justice Blackmun, concurring separately, said he agreed with the plurality "insofar as it holds that the fact that anticompetitive conduct is sanctioned, or even required, by state law does not of itself put that conduct beyond the reach of the Sherman Act."*Id.* at 605, 96 S.Ct. 3110 (Blackmun, J., concurring in the judgment).

Subsequent cases cast doubt on the precedential value of this fragmented opinion. The Court itself undercut the *Cantor* ***914** plurality in *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 108 S.Ct. 1931, 100 L.Ed.2d 497 (1988), in which the Court stated that "'where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action,' those urging the governmental action enjoy absolute immunity from antitrust liability for the anticompetitive restraint." *Id.* at 499, 108 S.Ct. 1931 (quoting *Noerr*, 365 U.S. at 136, 81 S.Ct. 523) (internal alteration omitted).

The lower courts have also interpreted *Cantor* narrowly. In *Greenwood Utilities*, the Fifth Circuit held that *Cantor* "cannot support" a broad rule that *Noerr-Pennington* immunity never extends to the consequences of government acts that result from immunized petitioning. *See* 751 F.2d at 1504. Such a rule would weaken *Noerr-Pennington*, the Fifth Circuit held: "First Amendment petitioning privileges would indeed be hollow if upon achieving a petitioned-for end the petitioner were then subjected to antitrust liability for his success." *Id.* at 1505. The Fifth Circuit distinguished *Cantor* because, in that case, the pri-

vate actor (not the government) had independently created the restraint. *See id.* at 1504. The Fifth Circuit therefore held that *Noerr-Pennington* immunity extends to restraints that are created by the government in response to private-party petitions, as long as those restraints are "not simply government approval of private conduct." *Id.*; *see also Bonollo Rubbish Removal, Inc. v. Town of Franklin*, 886 F. Supp. 955, 965 (D.Mass.1995) ("A *Noerr-Pennington* doctrine which shielded a private party in its attempt to secure a benefit from the government but left the party open to suit if the benefit was actually received would not serve the interests of free speech and open access to government that the *Noerr* and *Pennington* Courts intended to protect.").

For our part, we have followed *Allied Tube* and explicitly held that *Noerr-Pennington* immunity protects a private party from liability not only for the petition, but also for any injuries that result "directly" from valid government action taken on the petitioner's behalf. *Sessions Tank Liners, Inc. v. Joor Mfg., Inc.*, 17 F.3d 295, 299 (9th Cir.1994). This rule is dispositive of Sanders's case, to the extent the injury he alleges-supracompetitive cigarette prices-resulted directly from the action of the State of California, that is, from "the MSA and the Attorney General's enforcement of the escrow statute and contraband statute." Although subsequent agreements by the defendants to engage in the "operation of an output cartel" might not be immune from liability under this rule, Sanders's complaint does not allege any such subsequent agreement in restraint of trade. Therefore, because Sanders's complaint is based on

injuries caused directly by government action, *Noerr-Pennington* immunity shields the tobacco defendants from liability for the alleged supracompetitive price increases.[9] Since Sanders's claim against the tobacco defendants is predicated on these price increases, his claim against the tobacco defendants must fail.

2. State action immunity

The State of California, for its part, argues that state action immunity, or ***915** "*Parker* immunity," protects it from liability both for entering into the MSA and for enacting the implementing statutes. We agree.

The *Parker* immunity doctrine protects most state laws and actions from antitrust liability. The doctrine originated in *Parker v. Brown,* 317 U.S. 341, 350-52, 63 S.Ct. 307, 87 L.Ed. 315 (1943). In *Parker,* the Court dismissed a Sherman Act challenge to a California law that restricted competition among raisin manufacturers. The Court held that nothing in the Sherman Act suggests its purpose is "to restrain a state or its officers or agents from activities directed by its legislature." *Id.* at 350-51, 63 S.Ct. 307. Thus, even a state law that would violate the Sherman Act is immune from attack on antitrust grounds. *See id.* The only exception to this rule is a state law that at-

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[9] The Second Circuit in *Freedom Holdings* found that the MSA implementing statutes were not themselves protected by *Noerr-Pennington* immunity because "the immunity for advocacy cannot sensibly protect the resultant anticompetitive legislation from being held to be preempted as in conflict with the Sherman Act. Otherwise, all such legislation would be immune." 357 F.3d at 233. This holding may be correct, but the defendants here do not claim that *Noerr-Pennington* immunity protects the implementing statutes from preemption.

tempts to "give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." *Id.* at 351, 63 S.Ct. 307.

The Supreme Court has never specified what conduct comprises a state action that is "directed" by the state legislature and is therefore immune. In post-*Parker* cases, however, the Supreme Court has articulated some general tests to help decide whether a particular action qualifies for *Parker* immunity. A threshold question, therefore, is whether a court approved settlement like the MSA may be protected by *Parker* immunity. The next question is whether the MSA scheme in particular meets the Supreme Court criteria for *Parker* immunity.

The answer to the first question is clear under our court's precedents. If a government entity enters into a settlement like the MSA, the settlement is a "state action" that may be protected by *Parker* immunity. We have held that *Parker* covers not only state legislation, but also the acts of courts and executive-branch officials. *See Charley's Taxi Radio Dispatch Corp. v. SIDA of Hawaii, Inc.*, 810 F.2d 869, 876 (9th Cir.1987); *Deak-Perera Hawaii, Inc. v. Dept. of Transportation*, 745 F.2d 1281, 1283 (9th Cir.1984). The MSA in particular seems to involve several state actions. To begin with, the lawsuits against the tobacco defendants were initially filed by the states. Even though private tobacco companies initiated the settlement negotiations, the California attorney general ultimately approved the MSA, and the state court approved the settlement in a consent decree

and final judgment. The MSA thus fits the basic definition of "state action" for *Parker* purposes.

The second question-whether the MSA scheme meets all the criteria for *Parker* immunity-is considerably more complex. Even though the MSA is probably a state act, it does not necessarily qualify for *Parker* immunity from antitrust liability. A series of Supreme Court cases holds that any action in restraint of trade is only immune if it satisfies a two-part test: The anticompetitive policy not only must be (1) "clearly articulated and affirmatively expressed as state policy," but also must be (2) "actively supervised by the state itself." *Cal. Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc.* (*Midcal*), 445 U.S. 97, 105, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980) (quoting *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 410, 98 S.Ct. 1123, 55 L.Ed.2d 364 (1978) (plurality opinion)) (internal quotation marks omitted); *see also 324 Liquor Corp. v. Duffy*, 479 U.S. 335, 343-44, 107 S.Ct. 720, 93 L.Ed.2d 667 (1987); *Patrick v. Burget*, 486 U.S. 94, 100, 108 S.Ct. 1658, 100 L.Ed.2d 83 (1988); *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 631, 112 S.Ct. 2169, 119 L.Ed.2d 410 (1992). Other Supreme Court cases, however, explicitly hold that a state's own ***916** acts in the antitrust area are always immune; these cases suggest that the two-part "*Midcal* test" is only needed to decide whether private conduct pursuant to a state statute gets *Parker* immunity. In other words, a state need not show it "actively supervises" private parties, as long as the state itself, acting as sovereign, created the restraint of trade. *See Hoover v. Ronwin*, 466 U.S. 558, 568-69, 104 S.Ct. 1989, 80 L.Ed.2d 590 (1984); *City of Co-*

lumbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 377-79, 111 S.Ct. 1344, 113 L.Ed.2d 382 (1991).

It is unclear whether *Hoover* and *Midcal* are coexisting "live" precedents, or whether one overrules the other. It is possible that the *Midcal* test is limited, as *Hoover* suggests, to cases in which the courts must decide whether private conduct is actually protected "state action." The *Midcal* line of cases, however, never mentions the *Hoover* line of cases, even though they chronologically overlap. Indeed, *324 Liquor*, which was decided after *Hoover*, explicitly states that the way a state statute gets *Parker* immunity is by satisfying the two-part *Midcal* test. *See* 479 U.S. at 343-44, 107 S.Ct. 720. Since *324 Liquor* never mentions *Hoover*, it is unclear whether the Supreme Court was saying that even sovereign state acts must meet the *Midcal* test (therefore overruling *Hoover* without saying so) or merely applying the *Midcal* test in an appropriate circumstance (by analyzing whether private conduct gets *Parker* immunity).

Whether the *Midcal* test applies to the MSA is a critical question for the present case. The lower courts have split on whether the MSA should get *Parker* immunity, chiefly because some apply *Midcal*, and some-following the *Hoover* precedent-do not. *Compare Bedell*, 263 F.3d at 259-65 (applying the *Midcal* test and finding no *Parker* immunity); *Freedom Holdings*, 357 F.3d at 226-32 (same), *with PTI*, 100 F.Supp.2d at 1195-96 (citing *Hoover*, declining to apply *Midcal*, and holding that *Parker* immunity protects defendants from liability); *S & M Brands*, 393 F.Supp.2d at 621-29 (same).

Sanders argues that the *Midcal* test is appropriate here and reasons that since California has never "actively supervised" the tobacco defendants' price increases, state action immunity protects none of the defendants from antitrust liability. The defendants, however, argue that the *Midcal* test is inappropriate because the MSA and the implementing statutes were "sovereign acts," and that under *Hoover,* the MSA, the Qualifying Act and the Contraband Amendment are automatically immune from suit.

Our circuit precedent indicates that the defendants are correct. In *Deak-Perera Hawaii,* we held that a state "acting as sovereign" is "immune from the federal antitrust laws." 745 F.2d at 1282 (internal citations and quotation marks omitted). We distinguished *Midcal* by noting that "this is not a case of private parties imposing competitive restraints in conjunction with state authorities. In such a case the inquiry would be different." *Id.* at 1283; *see also Charley's Taxi,* 810 F.2d at 875-76 (following *Deak-Perera*).

Nonetheless, Sanders argues that the *Midcal* line of cases have overruled *Hoover,* and that *Deak-Perera* and *Charley's Taxi* therefore are dead precedents. Sanders points to Ninth Circuit cases that, like the *Midcal* line of cases, apply the *Midcal* test without considering the *Hoover* rule that sovereign state acts are *per se* immune. *See, e.g., Snake River Valley Elec. Ass'n. v. Pacificorp,* 238 F.3d 1189, 1192-95 (9th Cir.2001). Even though these cases might be read to shed some doubt on *Hoover*'s viability, we conclude that the *Hoover* rule survives both logical ***917** scrutiny and a semantic parsing of the *Midcal* cases.

First, it makes no sense to apply the *Midcal* test to a sovereign state act. *Midcal* holds that an anticompetitive restraint is protected under *Parker* only if the state "actively supervise[s]" the anticompetitive conduct. 445 U.S. at 105, 100 S.Ct. 937. *Parker,* however, appears to extend immunity from antitrust liability to all government officers' acts if those acts are "directed by [a state's] legislature." 317 U.S. at 350-51, 63 S.Ct. 307. If the *Midcal* test applied to those government officers' acts, it would dramatically narrow the scope of immunized acts to those in which the government took an active role in supervising the marketplace. Rigid pricing schemes in which the state government itself sets prices for products, and enforces penalties on those who violated the controls, might be immune from antitrust liability, but gentler schemes that restrained competition without engaging in onerous "active supervision" might be illegal. Such a rule appears to conflict with a key holding of *Parker*: that the Sherman Act is not intended to interfere with state attempts to impose market restraints. *See Parker,* 317 U.S. at 350-51, 63 S.Ct. 307.

Second, the holding in *Hoover* is broader than the holdings in the *Midcal* line of cases. The Court in *Hoover* said that "[t]he starting point in *any* analysis involving the state-action doctrine is the reasoning of *Parker v. Brown.*" 466 U.S. at 567, 104 S.Ct. 1989 (emphasis added). Since *Parker* held that state acts are immune from antitrust liability, the *Hoover* Court reasoned, "[w]here the conduct at issue is in fact that of the state legislature or supreme court, we need not address the issues of 'clear articulation' and 'active supervision.' "*Id.* at 569, 104 S.Ct. 1989. "Closer

analysis" is only required "when the activity at issue is not directly that of the legislature or supreme court, but is carried out by others pursuant to state authorization." *Id.* at 568, 104 S.Ct. 1989. In short, *Hoover* clearly states that the *Midcal* test does not apply to sovereign state acts, which are immune from antitrust liability so long as they avoid preemption by authorizing *per se* illegal activities.

Midcal, however, makes no such blanket statements. In that opinion, the Court was chiefly concerned with how to distinguish between a private price-fixing scheme and an immunized state act. Indeed, each of the *Midcal* line of cases involved a private body-not a state-making anticompetitive decisions under the aegis of a state regulatory scheme. In *Midcal* and *324 Liquor,* the Court considered whether state-authorized pricing schemes for wholesale alcohol, which gave price-fixing control to private parties, had enough active state supervision to qualify for *Parker* immunity. *Midcal,* 445 U.S. at 103-06, 100 S.Ct. 937; *324 Liquor,* 479 U.S. at 342-45, 107 S.Ct. 720. In *Ticor,* the Court examined whether states had given too much leeway to title search companies to set their own rates. 504 U.S. at 632-40, 112 S.Ct. 2169. And in *Patrick v. Burget,* the Court analyzed a state-authorized, but privately-run, medical review board that allegedly restricted competition among doctors. 486 U.S. at 99-106, 108 S.Ct. 1658.

Furthermore, the Supreme Court has repeatedly hinted that the *Midcal* test is limited only to situations in which private bodies operate under state regulatory authority. In *Southern Motor Carriers Rate Conf., Inc v. United States,* 471 U.S. 48, 105

S.Ct. 1721, 85 L.Ed.2d 36 (1985), the Court stated that *Midcal*'s two-pronged test is "applicable to private parties' claims of state action immunity," but said nothing about whether the test applied to sovereign ***918** state acts. 471 U.S. at 61, 105 S.Ct. 1721. In *Ticor,* the Court clarified that in *Midcal,*"we announced the two-part test *applicable to instances where private parties participate in a price-fixing regime.*"504 U.S. at 633, 112 S.Ct. 2169 (emphasis added).

Hoover therefore controls in cases where the state, acting as a sovereign, imposes restraints on competition. The state in such situations is immune from antitrust liability, regardless of whether the restraint in question would satisfy the *Midcal* test.

Since the California attorney general's act of entering into the MSA is a sovereign act, as are the legislature's actions in enacting the Qualifying Act and Contraband Amendment, the state is immune from antitrust liability for these actions, unless the MSA scheme is an attempt to "give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." *Parker;* 317 U.S. at 351, 63 S.Ct. 307. The MSA and the implementing statutes authorize no illegal activity, as we discussed above in analyzing whether the implementing statutes are preempted. *See* Part III.A *supra.* We therefore hold that *Parker* immunity protects the state from antitrust liability for entering into the MSA and for passing the implementing statutes.

In so holding, we recognize that we disagree with two other circuits. The Second Circuit in *Freedom*

Holdings and the Third Circuit in *Bedell* applied the *Midcal* analysis and held that *Parker* immunity does not protect the state from liability for entering into the MSA. *Freedom Holdings,* 357 F.3d at 226-32; *Bedell,* 263 F.3d at 259-66. As discussed above, however, we believe the *Midcal* analysis would only be appropriate if the MSA is not a sovereign act, which we conclude it is.

We also reject the *Bedell* Court's conclusion that the MSA is not a sovereign state act, but rather resembles a "hybrid restraint" existing somewhere outside the realm of *Parker* immunity. *Bedell,* 263 F.3d at 258. To explain why we disagree, it is necessary to briefly touch on the concept of a "hybrid restraint."

A hybrid restraint is one form of state law that is illegal *per se* under the Sherman Act. *See Fisher,* 475 U.S. at 267-270, 106 S.Ct. 1045. A hybrid restraint exists when the state creates "nonmarket mechanisms [that] merely enforce private marketing decisions." *Id.* at 267-68, 106 S.Ct. 1045. In other words, it exists when the state passes laws that enforce companies' decisions to collude on prices, to dictate prices by which other companies must abide, or to otherwise violate the Sherman Act.

Ninth Circuit and Supreme Court cases provide a few examples of hybrid restraints. Each of these cases hinged on a state's decision to let producers dictate market conditions to others-for example, by "posting" prices that then became legally binding on buyers and other producers. *See id.* at 268-69, 106 S.Ct. 1045 (characterizing as hybrid restraints the price-posting schemes that had been the subjects of *Midcal* and of *Schwegmann Bros. v. Calvert Distillers*

Corp., 341 U.S. 384, 71 S.Ct. 745, 95 L.Ed. 1035 (1951)); *see also 324 Liquor*, 479 U.S. at 345 n. 8, 107 S.Ct. 720 (noting that a New York law allowing liquor wholesalers to fix their own prices could be called a hybrid restraint); *Miller*, 813 F.2d at 1349-51 (finding a hybrid restraint where a statutory scheme let wholesalers set prices that retailers were legally bound to honor).

Such a scheme necessarily involves a delegation of market power to private parties that is *per se* illegal under the Sherman ***919** Act. *See Miller*, 813 F.2d at 1349-51 (*citing Fisher*, 475 U.S. at 267-68, 106 S.Ct. 1045). Otherwise, the hybrid restraint could not be attacked as facially invalid. As we have already discussed, the MSA involves no such delegation of *per se* illegal power such as the ability to fix prices. *See* Part III.A *supra*. We must therefore conclude that the MSA cannot be classified as a hybrid restraint.[10] Accordingly, we decline to follow the Third Circuit and instead hold that the state is entitled to *Parker* immunity in this case.[11]

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[10] The Sixth Circuit, in *Tritent*, reached a similar conclusion about the Kentucky version of the MSA scheme. The Sixth Circuit held that the *Rice v. Norman Williams Co.*, 458 U.S. 654, 102 S.Ct. 3294, 73 L.Ed.2d 1042 (1982), preemption analysis "must precede the analysis under the hybrid-restraint theory." *Tritent*, 467 F.3d at 558. Since the plaintiffs in *Tritent* had failed to demonstrate preemption, the Sixth Circuit declined to hold that the Kentucky version of the MSA scheme was a hybrid restraint. *Id.*

[11] The tobacco defendants argue that they, too, are entitled to *Parker* immunity. We need not reach this issue, since we have already held that they are entitled to immunity under the *Noerr-Pennington* doctrine.

C. State law claims

Sanders also brought claims under California antitrust law. California courts have held that the *Noerr-Pennington* immunity doctrine applies to protect private petitioners of the government from state-law antitrust liability in exactly the same way as it protects them from federal antitrust liability. *See Blank v. Kirwan,* 39 Cal.3d 311, 216 Cal.Rptr. 718, 703 P.2d 58, 63-65 (1985). Since *Noerr-Pennington* immunity shields the tobacco defendants from Sherman Act liability, it also shields them from state antitrust liability. *See PTI,* 100 F. Supp.2d at 1196.

As for the State of California's liability under its own laws, the district court correctly noted that the California legislature could hardly have violated its own statutes by passing another statute. *See Sanders,* 365 F. Supp.2d at 1104-05. Furthermore, the California courts have held that political divisions of the State of California are not subject to the Cartwright Act, which means that the state cannot be held liable for entering into the MSA. *See Blank,* 216 Cal. Rptr. 718, 703 P.2d at 65.

D. Conclusion

Sanders has failed to show that the MSA implementing statutes are *per se* illegal under the Sherman Act. Sanders also has failed to show that any of the defendants are liable under either the Sherman Act or under California antitrust law. Sanders therefore has failed to state a claim entitling him to relief, and the district court properly dismissed his lawsuit.

AFFIRMED.

APPENDIX B

365 F. Supp.2d 1093

United States District Court, N.D. California.

Steve SANDERS, individually and as class representative, Plaintiff,

v.

Bill LOCKYER, in his official capacity as Attorney General of the State of California; Philip Morris USA, Inc.; R.J. Reynolds Tobacco Company; Brown & Williamson Tobacco Corporation; and Lorillard Tobacco Company, Defendants.

No. C 04-02281 SI.

March 28, 2005.

ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS

ILLSTON, District Judge.

On January 12, 2005, this Court heard oral argument on motions to dismiss brought by defendant Bill Lockyer ("Lockyer") and defendants Philip Morris USA, Inc., R.J. Reynolds Tobacco Company, Brown & Williamson Tobacco Corporation, and Lorillard Tobacco Company (collectively "manufacturer defendants"). Having carefully considered the arguments of counsel and the papers submitted, the Court hereby GRANTS defendants' motions for the reasons set forth below.

BACKGROUND

This case arises out of the Master Settlement Agreement ("MSA") entered into on November 23, 1998, between the four leading domestic cigarette manufacturers and the attorneys general of forty-six states, including California.[1] The MSA and related legislation have been subject to multiple legal challenges, and two different district courts in this circuit have rejected such challenges. *See PTI, Inc. v. Philip Morris, Inc.*, 100 F. Supp.2d 1179 (C.D. Cal. 2000); *Forces Action Project LLC v. California*, 2000 WL 20977 (N.D. Cal. 2000).[2]

Under the MSA, the states agreed to dismiss pending suits and to refrain from filing suit against the four cigarette manufacturers, and the manufacturers

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[1] The District of Columbia and five U.S. territories are also parties to the MSA. *See* Compl. Ex. A, Master Settlement Agreement § II(rr).

[2] Other unsuccessful legal challenges to the MSA include *Premium Tobacco v. Fisher*, 51 F. Supp.2d 1099 (D. Colo.1999); *Hise v. Philip Morris, Inc.*, 46 F.Supp.2d 1201 (N.D. Okla. 1999), *aff'd mem.*, 208 F.3d 226, 2000 WL 192892 (10th Cir. 2000); *A.D. Bedell Wholesale Co. v. Philip Morris, Inc.*, 104 F.Supp.2d 501 (W.D. Pa. 2000), *aff'd*, 263 F.3d 239 (3d Cir. 2001), *cert. denied*, 534 U.S. 1081, 122 S.Ct. 813, 151 L.Ed.2d 697 (2002). In *Freedom Holdings, Inc. v. Spitzer*, 357 F.3d 205 (2d Cir. 2004), *reh'g denied*, 363 F.3d 149 (2d Cir. 2004), the Second Circuit reversed the district court's dismissal of an action brought against New York state officials challenging MSA-related legislation, finding that state action immunity doctrine did not immunize the legislation from preemption by the Sherman Act. On remand, the district court denied plaintiffs' motion for a preliminary injunction with regard to the MSA, New York's "escrow statute," and the Contraband statute. *See Freedom Holdings, Inc. v. Spitzer*, 2004 WL 2035334 at *31, 2004 U.S. Dist. LEXIS 18296 at *101 (2004).

agreed to pay billions of dollars to the states over a number of years, to be used to pay health costs from smoking-related illnesses and to fund smoking prevention programs. *1096 These four manufacturers also agreed to numerous restrictions regarding sales, marketing, advertising, lobbying, research, education, and disclosure practices. MSA § III. Courts in the settling states issued consent decrees and final judgments approving the MSA.

The four manufacturer defendants in this case, Philip Morris USA Inc., R.J. Reynolds Tobacco Company, Brown & Williamson Tobacco Corporation, and Lorillard Tobacco Company, are referred to in the MSA as the "Original Participating Manufacturers," or OPMs. Under the MSA, the OPMs are required to make annual payments to the settling states based on their relative market shares. Other cigarette manufacturers existing at the time of the MSA were given ninety days to elect to participate in the MSA. Those who did are called "Subsequent Participating Manufacturers," or SPMs. An SPM is subject to the same marketing restrictions as the OPMs but guaranteed a permanent exemption from the annual payment requirement as long as its market share remains below 1998 levels or 125% of 1997 levels, whichever is greater. MSA § IX(i). Plaintiff alleges that the OPMs and SPMs account for at least 96% of all U.S. cigarette sales. Compl. ¶ 18. Manufacturers electing not to participate in the MSA are called "Non-Participating Manufacturers," or NPMs. NPMs are not subject to any marketing restrictions.

Plaintiff Steve Sanders represents a class of California consumers who purchased cigarettes manufac-

tured by one or more of the manufacturer defendants from June 9, 2000, to the present. Compl. ¶ 6. Plaintiff challenges the MSA as an "anticompetitive hybrid agreement" that permits the OPMs and SPMs to prevent price competition and raise cigarette prices. Compl. ¶ 3, 20. Plaintiff also alleges that the manufacturer defendants have "further protect[ed] their market dominance" by "obtain[ing] the passage of two California statutes" and have dramatically increased the price of cigarettes since the enactment of the MSA. *Id.* According to plaintiff, the MSA creates a cartel accomplished through several of its provisions: (1) the Relative Market Share Adjustment; (2) the Renegade Clause; (3) the NPM Downward Adjustment; (4) the Qualifying Acts; (5) the Contraband Amendments; and (6) the Severability Clause.

The Relative Market Share Adjustment provides that each individual manufacturer defendant's share of the annual payment obligation is based on its relative market share.[3] Plaintiff alleges that the Relative Market Share Adjustment restricts output and eliminates price competition because if one OPM raises prices, the others will be "induced and/or coerced" into following the price increase, since any increase in market share will be offset, exceeded, or substantially reduced by increased payment obligations. Compl. ¶ 21.

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[3] The MSA defines "market share" as a manufacturer's "respective share (expressed as a percentage) of the total number of individual Cigarettes sold in the fifty United States, the District of Columbia and Puerto Rico during the applicable calendar year." MSA § II(z).

The Renegade Clause permanently exempts an SPM from making annual payments as long as its market share remains below 1998 or 125% of 1997 levels. For each increase in market share, an SPM is penalized by having to pay a pro rata share of the annual payment. Thus, plaintiff alleges that the Renegade Clause effectively prevents SPMs from price competing with the manufacturer defendants by penalizing SPMs that increase their market share and offsetting the profits an SPM can get from additional sales. Compl. ¶ 22.

The NPM Downward Adjustment compensates manufacturer defendants for any *1097 loss in market share due to "disadvantages" associated with participating in the MSA, including price competition with a NPM. In some circumstances, the manufacturer defendants' payment obligation may be decreased up to three times the amount of revenue lost, which coerces states to protect the manufacturer defendants' market share so as not to suffer this reduction in revenue. Compl. ¶ 23. According to plaintiff, the states have enacted laws that protect the MSA's anti-competitive provisions, specifically the Qualifying Acts and Contraband Amendments, and these statutes are preempted by federal antitrust laws.[4]

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[4] Defendant Lockyer refers to the "Qualifying Act" as the "reserve fund statute." Under the MSA, a Qualifying Act is one that is substantively identical to the Model Statute set forth in the agreement. MSA Ex. T. He refers to the "Contraband Amendment" as "California's 'complementary legislation.' " Def. Lockyer's Mot. at 8:18-19. The Court uses the language of the complaint and thus refers to these statutes as the Qualifying Act and Contraband Amendment.

The Qualifying Act aims to "effectively and fully neutralize[ ] the cost disadvantages that the Participating Manufacturers experience vis-a-vis Non-Participating Manufacturers." MSA §IX(d)(2)(E).[5] The Qualifying Act creates a barrier to entry for cigarette manufacturers who did not begin selling cigarettes until after 1998. These manufacturers "have no practical choice" but to become NPMs, since without 1997 or 1998 market share they cannot benefit from the permanent payment exception of SPMs. Compl. ¶ 27(a)(1). As NPMs, these manufacturers pay a percentage of each unit sale into escrow, forcing them to set prices higher than SPMs. The escrow payments discourage price competition with the OPMs and SPMs. The Contraband Amendment, a subsequent amendment to the Qualifying Act, permits the Attorney General to prevent a tobacco manufacturer from selling cigarettes in California if the manufacturer is not complying with the Qualifying Act.

Plaintiff alleges that the manufacturer defendants have used the MSA, the Qualifying Act, and the Contraband Amendment to protect their market shares while they price gouge California consumers. Specifically, plaintiff contends that the OPMs raised the price of a carton of cigarettes by $4.50 on the day the MSA was enacted, and by $7.70 per carton in the three and a half years since then, earning an additional $20 billion per year in revenue. Compl. ¶ 29. Plaintiff alleges that the OPMs' market shares "have not appreciably changed" despite these price in-

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[5] California's Qualifying Act is Cal. Health & Safety Code § 104557. The Contraband Amendment is Cal. Bus. & Prof.Code § 22979.

creases. *Id.* at ¶ 30. In addition, the State of California does not supervise the OPMs' pricing decisions. *Id.* at ¶ 29.

Plaintiff seeks declaratory relief under 28 U.S.C. § 2201 against defendant Lockyer; injunctive relief under 42 U.S.C. § 1983 against defendant Lockyer; and injunctive relief under the Sherman Antitrust Act, 15U.S.C. § 1, against all defendants, on grounds that the statutes implementing the MSA are preempted by federal antitrust laws. Plaintiff also seeks damages from the manufacturer defendants for violations of Cal. Bus. & Prof.Code §§ 16720, Cal. Bus. & Prof.Code §§ 17200, common law unfair competition, and restitution.

Now before the Court are motions to dismiss the complaint by defendant Lockyer and the manufacturer defendants.[6]

***1098 LEGAL STANDARD**

Under Federal Rule of Civil Procedure 12(b)(6), a district court must dismiss a complaint if it fails to state a claim upon which relief can be granted. The question presented by a motion to dismiss is not whether the plaintiff will prevail in the action, but whether the plaintiff is entitled to offer evidence in support of the claim. *See Scheuer v. Rhodes,* 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974) (overruled on other grounds by *Davis v. Scherer,* 468 U.S. 183, 104 S.Ct. 3012, 82 L.Ed.2d 139 (1984)).

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[6] Plaintiff and defendant Lockyer have filed Requests for Judicial Notice ("RJN"). Defendants object to plaintiff's RJN on grounds of relevance. The Court finds that the materials submitted by plaintiff are relevant, and hereby GRANTS both parties' requests.

In answering this question, the court must assume that the plaintiff's allegations are true and must draw all reasonable inferences in the plaintiff's favor. *See Usher v. City of Los Angeles,* 828 F.2d 556, 561 (9th Cir. 1987). Even if the face of the pleadings suggests that the chance of recovery is remote, the Court must allow the plaintiff to develop the case at this stage of the proceedings. *See United States v. City of Redwood City,* 640 F.2d 963, 966 (9th Cir. 1981).

If the court dismisses the complaint, it must then decide whether to grant leave to amend. The Ninth Circuit has "repeatedly held that a district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts." *Lopez v. Smith,* 203 F.3d 1122, 1130 (9th Cir. 2000) (citations and internal quotation marks omitted).

DISCUSSION

I. Lockyer's Motion to Dismiss

The first three claims against defendant Lockyer challenge the validity and enforceability of California's Qualifying Act and Contraband Amendment, as *per se* violations of federal antitrust law subject to preemption by the Sherman Antitrust Act, 15U.S.C. § 1 et seq. Lockyer moves to dismiss plaintiff's first, second, and third causes of action against him on grounds that (1) the state-action immunity doctrine protects California's legislation implementing the MSA; and (2) even if this immunity does not apply, California's Qualifying Act and Contraband Amendment are not preempted by federal antitrust law. In addition, Lockyer contends that, to the extent that

plaintiff is challenging the MSA itself, the *Noerr-Pennington* doctrine bars plaintiff's claims.

A. State action immunity

The state action doctrine, first enunciated by the Supreme Court in *Parker v. Brown,* 317 U.S. 341, 350-52, 63 S.Ct. 307, 87 L.Ed. 315 (1943), provides that when a state exercises its authority and enacts a regulation with anti-competitive effects, the state and private parties acting at its direction are not liable for antitrust violations. *See PTI v. Philip Morris, Inc.,* 100 F. Supp.2d at 1196. The doctrine is based on principles of federalism and state sovereignty, and the *Parker* court reasoned that Congress did not intend the Sherman Act to restrain the conduct of state officials acting at the direction of the legislature. *Parker,* 317 U.S. at 350-51, 63 S.Ct. 307. The doctrine does not apply when the state acts as a "participant in a private agreement or combination by others for restraint of trade." *Id.* at 351-52, 63 S.Ct. 307. In addition, "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." *Id.* at 351, 63 S.Ct. 307. The *Parker* doctrine has been extended from pure legislative activity to action by the judicial and executive branches, as well as to the regulatory acts of municipalities that are authorized by state law. *See Hoover v. Ronwin,* 466 U.S. 558, 573, 104 S.Ct. 1989, 80 L.Ed.2d 590 (1984) (state supreme court was immune ***1099** from antitrust liability for regulating state bar admissions); *Charley's Taxi Radio Dispatch Corp. v. SIDA of Hawaii, Inc.,* 810 F.2d 869, 876 (9th Cir.1987) (state executives and agencies may be entitled to immunity for

actions pursuant to their constitutional or statutory authority); *City of Columbia v. Omni Outdoor Adver.*, 499 U.S. 365, 370-74, 111 S.Ct. 1344, 113 L.Ed.2d 382 (1991) (municipality immune under *Parker* when authorized by state law to set billboard restrictions).

Since *Parker*, the Supreme Court has clarified the state action doctrine. In *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980), it articulated "two standards for antitrust immunity": (1) the challenged restraint must be "clearly articulated and affirmative expressed as state policy"; and (2) the state must "actively supervise" the policy. *Midcal*, 445 U.S. at 105, 100 S.Ct. 937 (citations omitted). Then, in *Hoover v. Ronwin, supra*, the Supreme Court further held that "when a state legislature adopts legislation, its actions constitute those of the State, and *ipso facto* are exempt from the operation of the antitrust laws." *Hoover*, 466 U.S. at 567-68, 104 S.Ct. 1989. Reviewing its state action jurisprudence, the court observed:

> In cases involving the anticompetitive conduct of a nonsovereign state representative the Court has required a showing that the conduct is pursuant to a "clearly articulated and affirmatively expressed state policy" to replace competition with regulation. The Court has also found the degree to which the state legislature or supreme court supervises its representative to be relevant to the inquiry. When the conduct is that of the sovereign itself, on the other hand, the danger of unauthorized restraint of trade does not arise. Where the con-

> duct at issue is in fact that of the state legislature or supreme court, we need not address the issues of "clear articulation" and "active supervision."

Hoover, 466 U.S. at 569, 104 S.Ct. 1989 (citations omitted).

Thus, after *Midcal* and *Hoover,* the threshold inquiry is whether the challenged action is a sovereign act by the state or the conduct of private persons.

Here, Lockyer contends that California's Qualifying Act and Contraband Amendment are sovereign acts by the state of California, enacted by the legislature and enforced by politically accountable state officials. Plaintiff argues that the MSA and these legislative enactments together require *Midcal* analysis because the statutes are not exempt from antitrust scrutiny simply because they are sovereign acts of the state.[7] Applying *Midcal,* plaintiff contends that the MSA fails to meet the requirement that the state "actively supervise" the anticompetitive activity.

The Court finds that the settlement itself is a sovereign act of the state of California, and the Qualifying Act and the Contraband Amendment are direct legislative activity. As the *PTI* court recognized, the MSA is the product of litigation by the states' attorneys general and then negotiation with the major tobacco companies. It was approved in California by a judgment and consent decree in the California Superior Court. *See* Def. Lockyer's Mot. Ex. B. The Cali-

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[7] Plaintiff also argues that *Midcal* analysis is appropriate because the MSA is a "hybrid restraint." The Court considers this argument in Part II, below.

fornia legislature enacted the Qualifying Act in 1999 and the Contraband Amendment in 2003. *Parker* makes clear that legislative enactments are direct state action, and under *Hoover,* the *Midcal* analysis is neither appropriate nor required for direct acts of the sovereign. In addition, ***1100** the Ninth Circuit has expressly held that executive branch officials are entitled to *Parker* immunity "for actions taken pursuant to their constitutional or statutory authority, regardless of whether these particular actions or their anticompetitive effects were contemplated by the legislature." *Charley's Taxi,* 810 F.2d at 876; *see also Deak-Perera Hawaii, Inc. v. Dep't of Transp.,* 745 F.2d 1281, 1282-83 (9th Cir. 1984).

In *Charley's Taxi,* the challenged action was an exclusive contract to provide airport taxi services, with a maximum rate set by city ordinance. The Ninth Circuit found that "[w]hen the state executive or executive agencies act within their lawful authority, their acts are those of the sovereign," and did not address the active supervision requirement of *Midcal.* Plaintiff argues that *Charley's Taxi* is distinguishable because the government set the rates and prices, and that it no longer remains good law.

The Court is persuaded that *Charley's Taxi* remains good law and that the application of its rule by the district courts in this circuit was correct. *See PTI v. Philip Morris, Inc.,* 100 F.Supp.2d 1179; *Forces Action Project LLC v. State of California,* No. 99-0607 MJJ, Order Denying Leave to Amend at 8-9 & n. 12 (Manufacturer Defs.' Mot. Ex. A). The *Forces Action* court concluded that the Supreme Court's decision in *F.T.C. v. Ticor Title Ins. Co.,* 504 U.S. 621, 112 S.Ct.

2169, 119 L.Ed.2d 410 (1992) did not overrule *Charley's Taxi*, and that therefore even if the immunity recognized by the Ninth Circuit was broader than in other circuits, it was bound by the Ninth Circuit's decision. *See Forces Action Project*, Order Denying Leave to Amend at n. 12. This Court concurs in that assessment. Accordingly, defendant Lockyer is immunized under the state action doctrine from antitrust liability for the MSA itself and for enforcement of the Qualifying Act and Contraband Amendments.

The Second Circuit's contrary holding does not persuade the Court otherwise.[8] In *Freedom Holdings, Inc. v. Spitzer*, 357 F.3d 205, 233, *reh'g denied*,

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[8] In addition, the Court declines to follow the Third Circuit's pronouncements on this issue, which are equivocal at best. In *A.D. Bedell Wholesale Co. v. Philip Morris*, 263 F.3d 239 (3d Cir. 2001), *cert. denied*, 534 U.S. 1081, 122 S.Ct. 813, 151 L.Ed.2d 697 (2002), the Third Circuit affirmed the dismissal of claims brought against cigarette manufacturers on the basis of the *Noerr-Pennington* doctrine. The *Bedell* court also applied *Midcal* analysis and concluded that the manufacturers were not entitled to *Parker* immunity. 263 F.3d at 254. Although the *Bedell* court did not reach the question of "whether the acts of executive officials constitute state action that avoids *Midcal* analysis," 263 F.3d at 256, the Third Circuit later addressed this issue in *Mariana v. Fisher*, 338 F.3d 189 (3d Cir. 2003), *cert. denied*, 540 U.S. 1179, 124 S.Ct. 1413, 158 L.Ed.2d 80 (2004). It considered itself "bound by *Bedell* to abstain from reaching a different conclusion on *Parker* immunity," and by *Bedell's* statement that "because private participants in state action enjoy *Parker* immunity only to the extent the States enjoy immunity, the defendants are not shielded by *Parker*." It observed: "[p]erhaps unintentionally, because the issue was not before it, by this sentence *Bedell* seems to have assumed, if not decided, that the States have no *Parker* immunity," and noted that "[c]ritics may with some justification regard our discussion of *Parker* immunity as dictum, and well it may be." 338 F.3d at 203-04.

363 F.3d 149 (2d Cir. 2004), that Court of Appeals applied *Midcal* analysis and held that the alleged anti-competitive scheme was not actively supervised by the state of New York. The *Freedom Holdings* court considered *Hoover* inapplicable because the anticompetitive conduct in *Hoover* was performed entirely by state actors, but this Court finds that the principle enunciated in *Hoover* and *Parker* reaches beyond *Hoover's* facts. In light of this Supreme ***1101** Court authority and the apparent scope of state action immunity in the Ninth Circuit, the Court finds that defendant Lockyer is immune from antitrust liability under *Parker*.

Accordingly, the Court hereby GRANTS Lockyer's motion to dismiss on this ground.

B. Preemption analysis

Lockyer also argues that *Midcal* analysis is inappropriate because California's legislation is not, as plaintiff alleges in his first three causes of action, preempted by the Sherman Act. Preemption may exist if the challenged scheme constitutes a *per se* violation of the Sherman Act. A challenged state statute is a *per se* violation if, on its face, it "mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute." *Rice v. Norman Williams Co.*, 458 U.S. 654, 661, 102 S.Ct. 3294, 73 L.Ed.2d 1042 (1982). As with any inquiry regarding whether a state law is preempted by a federal statute under the Supremacy Clause, the fundamental question is "whether there exists an irreconcilable conflict between the federal and state

regulatory schemes." *Id.* at 659, 102 S.Ct. 3294. The existence of a "hypothetical or potential conflict is insufficient to warrant the preemption of the state statute." *Id.*

Lockyer contends that there is no conflict here because the challenged statutes do not permit tobacco manufacturers to fix prices, limit output, divide markets, or engage in violations of the antitrust laws. The Court agrees. The key allegation of plaintiff's Sherman Act claim is that the MSA creates an incentive for the manufacturer defendants to raise prices in parallel fashion, since a price increase by one OPM alone would increase market share for the others as well as for the SPMs, resulting in their having to make higher payments under the settlement. This scenario presents a "hypothetical" or "potential" conflict with the Sherman Act, but not the "irreconcilable" conflict required for preemption. The California statutes do not mandate, permit, or place irresistible pressure on manufacturers to take concerted action; rather they require unilateral action by each to make settlement or escrow payments. The statutes themselves also constitute action on the part of the California legislature, not concerted action by private parties in restraint of trade, as the Sherman Act requires. *See* 15 U.S.C. § 1. In addition, as Lockyer contends, the alleged barrier to entry for NPMs created by the Qualifying Act is not apparent from the face of the statute. Taking all of plaintiff's allegations as true, the Court cannot conclude that the MSA authorizes collusive or concerted action on the part of the manufacturers to raise prices to monopolistic levels.

Consequently, the Court finds that the MSA does not constitute a *per se* violation of the Sherman Act.

C. *Noerr-Pennington* immunity

According to Lockyer, Sanders' complaint appears only to challenge California's legislation implementing the MSA, not the MSA itself. But in the event that plaintiff seeks relief from Lockyer based on the MSA, defendant argues that this claim is barred by *Noerr-Pennington* immunity.

The *Noerr-Pennington* doctrine protects from antitrust liability those who petition the government in order to secure or amend their rights. *See E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961); *1102 *United Mine Workers of America v. Pennington*, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965). The doctrine encompasses the right to petition all branches of government, including the judiciary, *see Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972), but does not include sham or baseless petitioning. *Omni*, 499 U.S. at 379-80, 111 S.Ct. 1344; *Prof. Real Estate Investors, Inc. v. Columbia Pictures Indus.*, 508 U.S. 49, 60-61, 113 S.Ct. 1920, 123 L.Ed.2d 611 (1993). Under *Noerr-Pennington*, private entities are immune from liability for "mere attempts to influence the passage or enforcement of laws." *Noerr*, 365 U.S. at 135, 81 S.Ct. 523. The immunity exists regardless of the potentially anti-competitive motivations of the private actors. *Pennington*, 381 U.S. at 670, 85 S.Ct. 1585. The doctrine applies to government officials' petitioning activity in addition to

that of private parties. *Manistee Town Center v. City of Glendale,* 227 F.3d 1090, 1093 (9th Cir. 2000).

The issue for Lockyer is whether *Noerr-Pennington* applies only to the acts of petitioning themselves or whether it extends to the resulting government action, including a litigation settlement like the MSA. *Noerr-Pennington* immunizes certain conduct "incidental to the prosecution of the suit," which includes the decision to settle a claim. *See Theofel v. Farey-Jones,* 359 F.3d 1066, 1078 (9th Cir. 2004); *Columbia Pictures Indus., Inc. v. Prof'l Real Estate Investors, Inc.,* 944 F.2d 1525, 1528 (9th Cir. 1991), *aff'd,*508 U.S. 49, 113 S.Ct. 1920, 123 L.Ed.2d 611 (1993). Moreover, other courts have found that "incidental" conduct includes litigation settlements and the MSA in particular. *See Bedell,* 263 F.3d at 252 (reasoning that *Noerr-Pennington* immunity applies to settlement agreements between private parties and sovereign states "as it does to other more traditional petitioning activities"); *PTI,* 100 F. Supp.2d at 1193 (finding immunity for the MSA itself and for "the various Qualifying States, versions of the Model Act, trademark litigation, and anticompetitive conduct of the private defendants"); *Hise,* 46 F. Supp.2d at 1206 (finding that private defendants' conduct in negotiating and entering into the MSA was incidental to litigation), *aff'd mem.,*208 F.3d 226, 2000 WL 192892 (10th Cir. 2000); *Forces Action Project LLC v. California,* 2000 WL 20977, at *8 (N.D. Cal. Jan. 5, 2000) (finding *Noerr-Pennington* immunity for the actions of government and tobacco company defendants in entering into the MSA). This Court agrees that *No-*

err-Pennington immunity applies to the MSA as the direct result of protected petitioning activity.

Accordingly, the Court hereby GRANTS defendant Lockyer's motion to dismiss.

II. Manufacturer Defendants' Motion to Dismiss

The manufacturer defendants move to dismiss plaintiff's third, fourth, fifth, sixth, and seventh causes of action against them, arguing that all claims are barred by both the *Noerr-Pennington* and *Parker* immunity doctrines.

A. *Noerr-Pennington* immunity

The manufacturers argue that all of the conduct alleged in Sanders' complaint is immunized under the *Noerr-Pennington* doctrine. As discussed above, *Noerr* immunity protects efforts by private actors to influence public officials, regardless of their anticompetitive motivations. *Omni,* 499 U.S. at 380, 111 S.Ct. 1344; *Pennington,* 381 U.S. at 670, 85 S.Ct. 1585. Plaintiff contends that while *Noerr-Pennington* applies to the manufacturers' activities in negotiating and achieving the MSA, there is no immunity for "the subsequent operation of an anticompetitive restraint." Pl.'s Opp'n at 10:26-27. He argues that *Noerr-Pennington* protects only petitioning conduct ***1103** of the manufacturer defendants, and that the MSA and related legislation are merely "fruits" of the petitioning activity not covered by the doctrine.

Every district court to consider the application of *Noerr-Pennington* to the MSA and related statutes has concluded that the conduct of the tobacco manufacturers in negotiating and entering into the settlement is immunized under the doctrine. *See PTI,* 100

F.Supp.2d at 1193 ("the private defendants are clearly immune for their activities involved with the negotiation, execution, and attempts to implement the MSA, the Qualifying Statute, and the Model Act"); *Forces Action Project,* 2000 WL 20977 at *8 ("defendants action in negotiating and entering into the MSA are immunized from suit"); *Hise,* 46 F.Supp.2d at 1206 ("defendants' activities, in negotiating the MSA with the several settling states and achieving a settlement agreement with those states, are protected under the *Noerr-Pennington* doctrine"); *Bedell,* 263 F.3d at 250-54 (affirming district court on this ground).[9] In addition, Ninth Circuit law has not changed since *PTI* and *Forces Action* were decided.

The Court cannot conclude that *Noerr-Pennington* immunity is limited in the manner plaintiff suggests. While the Ninth Circuit has not yet ruled on whether the doctrine can immunize anticompetitive restraints resulting from petitioning activity, several courts have expressly held that parties are immune from liability for antitrust injuries caused by the petitioned-for government action. *See, e.g., Bedell,* 263 F.3d at 252; *PTI,* 100 F.Supp.2d at 1193 (finding immunity for "[a]ll claims premised on the illegality of the MSA § under the antitrust laws"); *Forces Action Project,* Order Denying Leave to Amend at 9 ("[i]t is well-settled that the *Noerr-Pennington* doctrine applies to immunize entities where, as here, no First Amend-

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[9] While *Freedom Holdings* holds that *Noerr-Pennington* does not apply, it involved only a suit against New York state officials, not tobacco manufacturers, and a challenge to the MSA enabling statutes, not the MSA itself. Thus, it is not relevant to the manufacturers' motion.

ment rights are implicated and the alleged conduct would be deemed illegal *per se* under the antitrust laws"). This principle was also recognized by the Supreme Court in *Pennington. See* 381 U.S. at 669, 85 S.Ct. 1585. Moreover, plaintiff's argument that immunizing the fruits of petitioning activity would make all legislation immune is unavailing. To the contrary, the immunity would mean nothing if a petitioner "were then subjected to antitrust liability for his success." *Greenwood Utilities Comm'n v. Mississippi Power Co.,* 751 F.2d 1484, 1505 (5th Cir.1985); *see also Campbell v. City of Chicago,* 823 F.2d 1182 (7th Cir.1987). Plaintiff does not allege, and the Court does not find, that the settlement itself is a "sham," and thus the MSA is covered by *Noerr-Pennington.* The distinction plaintiff seeks to draw-between defendants' conduct in negotiating and achieving the settlement and their subsequent compliance with its regime-is one without a difference in this case.

The Court finds that *Noerr-Pennington* doctrine applies to the MSA and related California statutes. Accordingly, the manufacturer defendants are immune from suit for their operation under the settlement agreement and implementing legislation.

The manufacturer defendants' motion to dismiss is GRANTED on this ground.

B. State action immunity

The manufacturer defendants also argue that this doctrine protects them from suit because the MSA and implementing legislation are state action. As discussed above, the Court agrees that the MSA and ***1104** enabling legislation are state action, approved

by state courts, enacted by the legislature, and enforced by state officials. Plaintiff argues that the MSA and these legislative enactments require *Midcal* analysis and that the MSA fails to meet the second *Midcal* requirement that the state "actively supervise" anticompetitive activity. Sanders also contends that the MSA is a "hybrid restraint" rather than direct state action.

Where there is direct state action affording immunity, the immunity extends equally to private parties and state actors. *See PTI,* 100 F. Supp.2d at 1196. The Court finds that the settlement itself, the Qualifying Act, and the Contraband Amendment are state action. Accordingly, both the manufacturer defendants and defendant Lockyer are immunized under the state action doctrine from antitrust liability for the MSA itself, the state's enactment of the Qualifying Act and Contraband Amendments, and their operation under the MSA regime.

Moreover, the MSA and related statutes are not hybrid restraints. A hybrid restraint is a government action delegating regulatory power to private parties so that they can enforce their own private market decisions. *Rice v. Norman Williams Co.,* 458 U.S. 654, 665, 102 S.Ct. 3294, 73 L.Ed.2d 1042 (1982) (Stevens, J., concurring); *Fisher v. City of Berkeley,* 475 U.S. 260, 268, 106 S.Ct. 1045, 89 L.Ed.2d 206 (1986); *324 Liquor Corp. v. Duffy,* 479 U.S. 335, 107 S.Ct. 720, 93 L.Ed.2d 667 (1987). The MSA does not authorize collusive action among the manufacturers or give them the regulatory authority to set prices in the cigarette market. It simply imposes unilateral payment obligations on OPMs and SPMs and escrow contributions

for NPMs. Without an agreement by the manufacturers to raise prices, which Sanders does not allege, these defendants would not be subject to antitrust liability even if the MSA were a hybrid restraint. *Miller v. Hedlund,* 813 F.2d 1344, 1351 n. 4 (9th Cir.1987) (private parties operating independently under a hybrid restraint are not liable under the Sherman Act).

The Third Circuit's discussion of *Parker* immunity for the manufacturers in *A.D. Bedell Wholesale Co. v. Philip Morris,* 263 F.3d 239, does not compel a contrary conclusion. In *Bedell,* the Court of Appeals affirmed the dismissal of claims brought against cigarette manufacturers on the basis of the *Noerr-Pennington* doctrine. Though it acknowledged that "[its] analysis could end [t]here," the *Bedell* court then applied *Midcal* analysis and concluded that the manufacturers were not entitled to *Parker* immunity because the "anticompetitive injury here resulted from the tobacco companies' conduct after implementation of the [MSA] and not from any further positive action by the states." 263 F.3d at 258. The Third Circuit also considered the MSA a hybrid restraint. *Id.* Because this Court concludes that the MSA is not a hybrid restraint, and because the Ninth Circuit's state action jurisprudence counsels a different finding, the *Bedell* court's apparent dicta on this subject is not persuasive.

Accordingly, the manufacturer defendants are entitled to state action immunity. Their motion to dismiss is GRANTED on this ground.

C. Immunity for state law claims

The manufacturer defendants also contend that state action immunity protects them from liability from plaintiff's state law claims as well. *Midcal* does not apply to the scope of state action immunity under state law. Instead of considering whether Congress intended to restrict state action under the Sherman Act, the Court must consider whether the state of California intended to restrict its own action ***1105** by enacting the MSA-related statutes. *See People v. City & County of San Francisco,* 92 Cal.App.3d 913, 917, 155 Cal.Rptr. 319; *Blank v. Kirwan,* 39 Cal.3d 311, 323, 216 Cal. Rptr. 718, 703 P.2d 58 (1985). Plaintiff does not address this argument in his opposition. The Court finds that the legislative acts of the state of California cannot violate the state's own antitrust law, and thus defendants are immune from liability for plaintiff's Cartwright Act, Unfair Competition Law, and common law unfair competition claims.

Consequently, the Court GRANTS defendants' motion to dismiss plaintiff's state law claims.

CONCLUSION

For the foregoing reasons and for good cause shown, the Court hereby GRANTS the motions to dismiss by defendant Lockyer and the manufacturing defendants. Plaintiff's complaint is dismissed with prejudice. [Docket #s 24, 25]

IT IS SO ORDERED.